NOV 30 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1960

No. 557

COUNTY OF CRISP OF THE STATE OF GEORGIA, ET AL.,

Petitioners,

versus

SEABOARD AIR LINE RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

H. H. PERRY, JR.,
P. O. Address:
P. O. Box 747,
Albany, Georgia.
GRAYDON REDDICK,
GEORGE WRIGHT,
Attorneys for Petitioner.
P. O. Address:
Cordele, Georgia.

INDEX.

	Page
SUMMARY STATEMENT OF THE MATTER INVOLVED	1
(1) Opinion of the Circuit Court of Appeals	1
(2) Jurisdictional Matters	2
(3) Questions Presented For Review	2
(4) Statutes Involved	4
(5) Statement of the Case	7
THE FACTS	7
Construction of Section 10 of the Federal Power Act	11
The Validity of the Contract	16
CONCLUSION	22
APPENDIX	34
JUDGMENT	34
OPINION	35

LIST OF AUTHORITIES.

Cases:

Albany Bottling Company v. Watson, 103 Ga. 503, 505	18
Alabama Power Company vs. Smith, 229 Ala. 105, 155 So. 601	15
Arnold v. Walton, 205 Ga. 606, 54 S.E. 2d 424	20
Bibb County vs. Green, 42 Ga. App. 552 (156 SE 745)	17
City of Atlanta vs. Due, 42 Ga. App. 797-804 (157 SE 256)	17

LIST OF AUTHORITIES—(Continued)

Page

Cases—(Continued)

City Council of Augusta vs. Lamar, 37 Ga. App. 418 (140 SE 763) 17

City Council of Augusta v. Richmond Co., 178 Ga. 400 (1934) 13

City Council of Dawson v. Dawson Waterworks Co., 107 Ga. 696 (1899) 13

City Council of Dawson v. Dawson Waterworks Company, 106 Ga. 696 (32 SE 907) 13

Decatur County v. Praytor Inc. Co., 163 Ga. 929 (1927) 13

Federal Power Commission vs. State of Oregon, 349 U. S. 435, 75 S. Ct. 832, 99 L. Ed. 1215 11

First Iowa Hydro-Electric Co-operative vs. Federal Power Commission, 328 U. S. 152, 66 S. Ct. 906, 90 L. Ed. 1143, Reh den 328 U. S. 897, 66 S. Ct. 1337, 90 L. Ed. 11

Ford & Son, Inc. vs. Little Falls Fiber Company, supra, 280 U. S. 369, 50 S. Ct. 140, 74 L. Ed. 483 12

Great Northern Rwy Co. vs. Washington Eelectric Co., 107 Wash. 627, 86 Pa. 2d 208 14

Georgia Power Company vs. Federal Power Commission (Fifth Circuit) 152 F. 2d 908 11

Georgia Power Company vs. Kelly, 182 Ga. 33 (184 SE 861) 17

Georgia Power Company vs. Moore, 47 Ga. App. 411-413 (170 SE 520) 17

Henry Ford & Son, Inc. vs. Little Falls Fiber Company, 280 U. S. 369, 50 S. Ct. 140, 74 L. Ed. 483 12

Harkan v. City of Moultrie, 136 Ga. 561 (1911) 13

Howard vs. County of Bibb, 127 Ga. 291 (156 SE 745) 17

LIST OF AUTHORITIES—(Continued)

Page

Cases—(Continued):

Lavin vs. Philadelphia Electric Power Company, (Decd Pa.) 34 F.2d 224 13
Neal vs. Town of Decatur, 142 Ga. 205 (1914) .. 18
Oliver v. Hall County Memorial Hospital, 62 Ga. App. 95 18
Rice Hope Plantation vs. South Carolina Public Service Authority, 216 S. Ct. 500, 59 SE 2d 132 15
Screws v. City of Atlanta, 189 Ga. 839 (1940).. 18
Smith vs. Floyd County, 85 Ga. 420, (11 SE 850) 17
Town of Decatur v. Dekalb County, 130 Ga. 929 (1908) 18
Turner v. Fulton County, 109 Ga. 633, (1900) .. 18
United States vs. Central Stockholders Corporation of Vallejo (Ninth Circuit) 52 F. 2d 322 13
Wright v. Floyd County, 1 Ga. App. 582, 585 (1907) 18

OTHER AUTHORITIES.

Article VII, Section VII, Paragraph 1 of the Constitution of the State of Georgia 4, 9
Article I, Section III, Paragraph 1 of the Constitution of the State of Georgia 7, 8
Act (See Section 27, 16 USCA, Section 821) .. 14
Crisp County (Georgia Laws 1925, page 72, et seq.) 5
Rule 23 (1) (i) 2
Rule 21 (4) 2
Section 1254 (1) Title 28 of the United States Code Annotated 2
Section 10 of the Federal Power Act (16 U.S.C.A. Sec. 803 (c)) 3, 4, 8, 9, 10, 12

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960

No. .....

COUNTY OF CRISP OF THE STATE OF GEORGIA, ET AL.,

Petitioners,

versus

SEABOARD AIR LINE RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

TO HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

(1) Opinion of the Circuit Court of Appeals.

The opinion of the Fifth Circuit Court of Appeals is reported in 280 F 2d, page 873. A copy of the opinion

and judgment of the Court is attached hereto as an Appendix to this petition.

(2) Jurisdictional Matters.

The original judgment and opinion of the Fifth Circuit Court of Appeals was rendered July 12, 1960. A rehearing was filed in due time within the rules of that court and the same was denied on September 1, 1960. The jurisdiction of this court is invoked under the provisions of Section 1254 (1), Title 28, of the United States Code Annotated.

(3) Questions Presented For Review.

The questions presented are these:

(1) Does Section 10 of the Federal Power Act (16 U.S.C.A., Sec. 803 (c)) impose upon a licensee under that act liability for damages for injury to property arising out of the maintenance of the licensed dam, even though the licensee would not be liable for damages of the character claimed under the laws of the state in which are located the dam and the property said to have been injured? To state the matter differently: Does Section 10 of the Federal Power Act (16 U.S.C.A., Sec. 803 (c)) simply preserve to property owners such causes of action for injury to their property resulting from the licensed dam as are authorized under the laws of the several states, or does this section enlarge the liability of such licensee so as to authorize a

property owner to recover damages which could not be recovered under applicable state laws?

(2) Even if Section 10 of the Federal Power Act enlarges the liability of the licensee by making such licensee liable for any and all injuries to property resulting from the construction or maintenance of a dam whether or not damages therefor would be recoverable under state laws, would this statutory liability validate a contract by a county of the State of Georgia under which the county in effect agreed to be responsible for damages done to the property of an owner notwithstanding the fact that such contract constituted a "debt" which the county was prohibited from contracting under Article 7, Section 7, Paragraph 1 of the Constitution of the State of Georgia. In other words, would it not be true in such case that the liability of the county, if any there was, would have to rest solely upon the statutory provisions of the Federal Power Act and all laws including statutes of limitation applicable thereto, rather than upon a contract of the county and all laws including statutes of limitation applicable to the construction and enforcement of such contract?

(3) If the liability under Section 10 of the Federal Power Act (16 U.S.C.A., Sec. 803 (c)) of the licensee under that Act for "damages occasioned to the property of others by the construction, maintenance or operation of the project works" means no more than that the licensee shall be liable for recoverable damages as recognized by the laws of the state where the dam and

the property claimed to have been injured are located, then was Crisp County, a political subdivision of the State of Georgia, liable under the laws of the State of Georgia for repairs to the respondent railroad's embankment resulting, as alleged, from the continuous wave action and ebbing and flowing of the backwater and, if not, was the contract of Crisp County under which it undertook to perpetually make such repairs a valid and binding contract as against the county when considered in connection with the state constitutional prohibition against counties incurring such a debt and the general limitations relating to the power of counties to enter into contracts?

(4) Statutes Involved.

Section 10 of the Federal Power Act (16 U.S.C.A., Sec. 803 (c)) provides:

> . . . "Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor." . . .

Article VII, Section VII, Paragraph 1 of the Constitution of the State of Georgia (Sec. 2-6001 Annotated Code of Georgia) provides:

> "The debt hereafter incurred by any county, municipal corporation or political division of this State except as in this Constitution provided for, shall never exceed seven per centum of the as-

sessed value of all the taxable property therein, and no such county, municipality or division shall incur any new debt except for a temporary loan or loans, to supply casual deficiencies of revenue, not to exceed one-fifth of one percentum of the assessed value of the taxable property therein, without the assent of a majority of the qualified voters of the county, municipality or other political subdivision voting in an election for that purpose to be held as prescribed by law." . . . .

The amendment to the above constitutional provision relating to Crisp County (Georgia Laws 1925, page 72, et seq.) provides:

"Be it enacted by the General Assembly of the State of Gerogia and it is hereby enacted by authority of the same, that Article 7, Section 7, Paragraph 1, of the Constitution of Georgia as heretofore amended, shall be further amended, by adding at the end thereof a new sub-paragraph in the following words, to-wit: 'And except that the County of Crisp may incur a bonded indebtedness in addition to debts hereinbefore in this paragraph allowed to be incurred, to the amount in the aggregate not to exceed the sum of one million two hundred and fifty thousand dollars and at a rate of interest not to exceed five per centum per annum; which said bonds shall run for a period or periods of time not to exceed thirty years and may be issued from time to time and in such denomination as may be determined by the county authorities of said county, to be signed by the Chairman and the Clerk of the Board of Commissioners of Roads and Revenues of said county and shall be known and designated as Hydro-Electric Power

Bonds; and which said bonds shall be sold and the proceeds thereof used and handled by the Power Commission hereinafter provided for. The proceeds of all bonds issued and sold under this authority shall be used for the purpose of acquiring water power sites and locations on the Flint River within and, or without Crisp County, including the necessary overflow lands; and for the purpose of acquiring rights-of-way for power transmission lines; and for the purpose of improving, building, constructing, equipping, maintaining, leasing, or operating the necessary power dams, ponds, plants, machinery, transmission lines and distribution stations, including all necessary machinery and apparatus for the manufacture, generation, transmission, sale and distribution of water power and electric current. The right of eminent domain is conferred upon said County of Crisp for the purpose of acquiring such sites, locations, overflow lands, and rights-of-way necessary for the proper exercise of the rights conferred by this amendment. Said County of Crisp is fully authorized hereby to engage in the manufacture, generation and sale of water power and electric current for purposes of promoting the agricultural, industrial, and civic interests of said County and for any and all other purposes and to make all necessary contracts relating to the sale and disposition thereof including the right to fix the rate or rates to be charged for all water power and electric current used for lighting, heating, power, and other purposes in said county . . . ."

Article I, Section III, Paragraph 1 of the Constitution of the State of Georgia (Section 2-301 Annotated Code of Georgia) provides:

> . . . . . "Private property shall not be taken, or damaged, for public purposes without just and adequate compensation being first paid."

(5) Statement of the Case.

The Facts.

The questions above stated arise under the following facts:

Seaboard Air Line Railroad Company, respondent herein, instituted an action in the United States District Court for the Middle District of Georgia against Crisp County, a governmental subdivision of the State of Georgia, and its governing officials for the recovery of $54,286.18 representing the alleged cost to the railroad of repairing erosion to its fill and embankment serving as an approach to a trestle across the Flint River, it being alleged by the respondent railroad that the injury to its fill and embankment was due to the continuous wave action and ebbing and flowing of the backwater of an electric power dam on the Flint River owned and operated by Crisp County under a license from the Federal Power Commission pursuant to the Federal Power Act.

It further appeared from the allegations of the complaint that Crisp County constructed the dam in question sometime between 1925 and 1930 and that as a

result of the construction of the dam water was backed against the respondent railroad's fill and embankment which served as an approach to a trestle over which the tracks of the respondent railroad crossed the Flint River. It was alleged that in 1939 Crisp County and the respondent railroad entered into a contract which, in substance, required the county to repair existing damage to the embankment, to install rip rap along the slope of the embankment, and, finally, insofar as material here, required the county to protect the embankment against future damage.

There is no contention, nor has the respondent at any time contended that the water level of the backwater created by the dam has been increased since the contract of 1939. The complaint sought recovery of the expense incurred by the respondent railroad in repairing the erosion to the embankment.

It was the contention of the railroad that the petition embodying the foregoing facts stated a cause of action (1) under the provisions of the Constitution of the State of Georgia providing for "just and adequate compensation" for property taken or damaged for public purposes (Article I, Sec. 3, Paragraph 1 of the Constitution of Georgia of 1945, Sec. 2-301 Georgia Code Annotated); (2) under Section 10 of the Federal Power Act (16 U.S.C.A. sec. 803 (c)) heretofore quoted, and (3) under the terms of the contract.

The petitioners herein filed a motion to dismiss the complaint for failure to state a claim under Rule

of the Federal Rules of Civil Procedure, contending in connection therewith in substance (1) that when the county backed water against the respondent railroad's embankment the only right of action which the railroad had against the county under the laws of the State of Georgia was an action to recover "just compensation" under the Constitution of the State of Georgia; that the only damages recoverable under such constitutional provision was, in effect, for the difference between the market value of the embankment before and after the water was backed against the embankment, and the respondent railroad could not sue the county thereunder for consequential damage in the nature of the cost of repairs to the embankment due to injury brought about by the backwater, and further that the cause of action for proper damages under the constitutional provision was barred by the statute of limitations; (2) that the contract sued upon was invalid because the county thereby incurred a "debt" in violation of Article VII, Section VII, Paragraph 1, of the Constitution of the State of Georgia (Sec. 2-6001, Annotated Code of Georgia) and, further, because the county otherwise had no authority to enter into a contract assuming an obligation to pay to the respondent railroad damages in a different amount than it would have been liable for under the "just compensation" provisions of the Constitution of the State of Georgia; (3) that Section 10 of the Federal Power Act (16 U.S.C.A., Sec. 803 (c)) does not create a liability against a licensee for damages which were not recoverable under the laws of the State of Georgia.

The District Judge rendered an opinion in accordance with petitioner's contentions and dismissed the complaint.

Upon an appeal, the Court of Appeals for the Fifth Circuit reversed the District Court, holding that the complaint stated a cause of action under Section 10 of the Federal Power Act and on the contract. In so doing, the Circuit Court ruled in effect that Section 10 of the Federal Power Act (16 U.S.C.A., Sec. 803 (c)) creates against a licensee under that act, such as Crisp County, a liability for all damages to the property of others such as the cost of repairs of erosion of the embankment, and this irrespective of whether such damage would be recoverable under rules of law applicable under the laws of the State of Georgia, and that the contract by the county recognizing its liability under the statute for the payment of any damage done to the property of the respondent railroad was valid notwithstanding general rules of law limiting its right to contract or to create a "debt" as found in the laws of the State of Georgia. Hence, the pivotal question presented is whether the Circuit Court was correct in construing Section 10 of the Federal Power Act (16 U.S.C.A., Sec. 803 (c)) as not only preserving to a landowner all causes of action which the landowner might have for damages under the laws of the state, but as also imposing upon a licensee an additional and greater liability for damages than is imposed by the laws of the several states.

Construction of Section 10 of the Federal Power Act.

The decision of the Circuit Court is clearly erroneous. Decisions cited by the Circuit Court not only fail to support, but are in principle in conflict with its rulings. In the case of *First Iowa Hydro-Electric Co-operative vs. Federal Power Commission*, 328 U.S. 152, 66 S. Ct. 906, 90 L. Ed. 1143, Reh. den. 328 U.S. 897, 66 S. Ct. 1337, 90 L. Ed. 1647, this court simply held that the Federal Power Commission had the authority to grant a license for a dam notwithstanding no permit had been obtained by the licensee from the State of Iowa. The Court pointed out that the Federal Government's power with respect to the grant or denial of permission to construct a dam was paramount and exclusive and that Congress did not intend to give a state a veto power on this subject.

In *Georgia Power Company vs. Federal Power Commission (Fifth Circuit)* 152 F. 2d 908, the court simply ruled that the findings of the Federal Power Commission upon the question of the navigability of the streams there involved was supported by the evidence and affirmed the power of the commission to pass upon the question of the grant or denial of a license for a dam at a point where the stream was not navigable if the dam would affect the navigable portion of the stream.

In *Federal Power Commission vs. State of Oregon*, 349 U.S. 435, 75 S. Ct. 832, 99 L. Ed. 1215, the holding of the court was to the effect that the Federal Power Commis-

sion had authority to grant a license for a dam on reserved land of the United States.

Section 10 of the Federal Power Act was not involved in any of the above decisions.

In *Henry Ford & Son, Inc., vs. Little Falls Fiber Company*, 280 U.S. 369, 50 S. Ct. 140, 74 L. Ed. 483, the licensee who, pursuant to authority granted under the license, had placed flash boards on a federal dam thereby raising the backwater of the dam approximately two feet, was held liable for damages to the owner of a factory whose dam and power facilities were impaired as a result of the increased water level. There was no claim that the licensee was not liable for such damage under the state law. On the contrary, this court distinctly recognized that the licensee was responsible for the damage claimed under the laws of the state. The licensee undertook to claim that the right of the damaged party to have the river flow in its natural manner, without obstruction, *though recognized by state law*, was subordinate to the power of the Federal Government exerted by the power commission through its licensee and therefore that the damage incurred by the property owner was damum absque injuria. However, this court held that under Section 10 of the Power Act, Congress did not intend to lend to the licensee the Federal Government's soyereign immunity and hence that the injured party could assert against the licensee any action for damages available under the state law.

In *United States vs. Central Stockholders Corporation of Vallejo (Ninth Circuit)* 52 F. 2d 322, the facts were that the Federal Government undertook to have the court declare that its licensee was not liable to a lower riparian owner for use of waters of the San Joaquin River for power purposes notwithstanding decisions of the California Supreme Court upholding the right of a lower owner of riparian lands to annual overflow of waters of that river. The court pointed out that the case involved, as did the case of *Ford & Son, Inc. vs. Little Falls Fiber Company, supra*, 280 U.S. 369, 50 S.Ct. 140, 74 L. Ed. 483, an interference by a licensee for a private right "recognized by state law" and citing Section 10, held that a licensee was not exempt under the Federal Power Act from paying compensation to a lower riparian owner whose water rights under state law were interferred with.

In *Lavin vs. Philadelphia Electric Power Company, (Dced Pa.)* 34 F. 2d. 224, the court held that the complaint stated no cause of action under Section 10 because that section applied only to damages arising from the construction and operation of the dam and the generation of electricity therefrom whereas the damages claimed in the petition related to the power line distribution system by which the generated electricity was transmitted and delivered. No question was there presented as to whether damages not recoverable under state law could be recovered by a property owner against a licensee by virtue of the provisions of Section 10.

In *Great Northern Rw. Co. vs. Washington Electric Co.*, 107 Wash. 627, 86 Pa. 2d 208, the railroad sued the electric company, a licensee under the Federal Power Act, for damage for the erosion of its fill. The electric company made the point that the railroad's fill was illegally situated in the Columbia River, a navigable stream; that the railroad had no title or proprietary interest in the fill so situated as against the United States and that it had no title or proprietary interest therein as against the railroad which was acting as a licensee or agent of the United States government. The court held that the railroad had a sufficient property interest in the fill to warrant a recovery of damages. There was no claim made that the railroad was not entitled to recover for such damage under the state law. On the contrary, the opinion apparently recognized that such a right and cause of action did exist under the state law.

The rulings in the foregoing cases that a licensee under the Federal Power Act, is not protected under the license against liability for damage to property rights recognized under state law do not justify the conclusion reached by the Circuit Court here to the affect that under Section 10 of the Power Act, a licensee, such as Crisp County, is liable for consequential damages to property, notwithstanding such licensee would not be liable for such damages under state law. On the contrary, under the terms of the Act (See Section 27, 16 USCA, Section 821) and all of the decisions above cited, it is clearly recongized that it was the purpose of Congress to leave in force all state laws pertaining to

property and other rights unless they conflict with the dominant power of the Federal Government thereunder to promote the development of power on navigable streams and their tributaries. The enlargement of the liability of a licensee under the laws of the several states with respect to damage to property is in no sense essential to the purpose of that act. If the Federal Government had not assumed jurisdiction over navigable streams under the Federal Power Act, the construction of dams on such streams would have been left to regulation by the several states and in such case a licensee would have been responsible only for such damages that were appropriate under the laws of the several states. The fact that the Federal Government has assumed jurisdiction to grant licenses does not argue for the imposition upon a licensee of any greater liability.

In two State Court Decisions, the Supreme Court of South Carolina and of Alabama have, as is recognized by the Circuit Court in its opinion, distinctly ruled contrary to the ruling made by the Circuit Court.

See: *Rice Hope Plantation vs. South Carolina Public Service Authority*, 216 S. C. 500, 59 SE 2d 132; *Alabama Power Company vs. Smith*, 229 Ala. 105, 155 So. 601.

A proper construction of Section 10 of the Federal Power Act requires only that a licensee respond in damages for injury to property in accordance with the laws of the state notwithstanding the grant of the licensee to build the dam under the Federal Power Act.

If the rule adopted by the Circuit Court is established, then Federal Courts will have to develop a federal body of law relating to damages arising as the result of a federally licensed project and the rules to govern their recovery. Sound reasoning indicates that the word "damages" as used in Section 10 means *legally recoverable* "damages" and since there is no federal body of law governing damages, it is reasonable to conclude that legally recoverable "damages" has relation to the laws of the state where the project and the property are located.

The Validity of the Contract

If the position taken above concerning the proper interpreation of Section 10 of the Federal Power Act is correct, the act cannot be sustained, as the Circuit Court decided, upon that section, as distinguished from the law of the State of Georgia with respect to the damage sued for nor can it be sustained on the contract on the Circuit Court's theory that the contract was valid because it simply recognized contractually the liability of the County under Section 10.

Under the Constitution of the State of Georgia, as shown by the provision above quoted, property cannot be taken or damaged without just compensation being paid therefor. Where a public authority having the power of eminent domain takes or damages property, the question of damage may be settled by eminent domain proceedings or, if the taking and damaging is done without the initiation by such public authority of

eminent domain proceedings, in an action brought by the owner against the public authority. In both instances, the damages and the only damages recoverable as just compensation is the market value of the land taken and damaged. Hence, where land is taken or damaged by a public authority having the power of eminent domain, the law of Georgia permits a recovery only for a permanent damage to the realty and prohibits, under all circumstances, recover against a public authority for consequential damages such as is involved in the present case consisting of cost of repairing erosion to the respondent railroad's embankment due to the normal wave action of the backwater.

See: *City Council of Augusta vs. Lamar*, 37 Ga. App. 418, (140 SE 763); *Bibb County vs. Green*, 42 Ga. App. 552 (156 SE 745); *City of Atlanta vs. Due*, 42 Ga. App. 797-804, (157 SE 256); *Georgia Power Company vs. Moore*, 47 Ga. App. 411-413, (170 SE 520); *Smith vs. Floyd County*, 85 Ga. 420, (11 SE 850); *Howard vs. County of Bibb*, 127 Ga. 291, (156 SE 745); *Georgia Power Company vs. Kelly*, 182 Ga. 33, (184 SE 861).

Under the laws of Georgia, a County is not suable as for a continuing abatable nuisance:

Bibb County vs. Green, 42 Ga. App. 552 (156 SE 745)

Hence, under the laws of Georgia, Crisp County could not have been liable for the consequential damages here sued for.

While "(e)very county is a body corporate with power to sue or be sued in any court", 23 Ga. Ann. sec.

1501, this means that a county can be sued successfully only upon liabilities against it created by statute or for breach of a valid contract which it is authorized by law to make.

Decatur County v. Praytor &c. Co., 163 Ga. 929 (1927); *Town of Decatur v. Dekalb County*, 130 Ga. 929 (1908); *Turner v. Fulton County*, 109 Ga. 633, (1900); *Horkan v. City of Moultrie*, 136 Ga. 561 (1911); *Neal vs. Town of Decatur*, 142 Ga. 205 (1914); *City Council of Augusta v. Richmond Co.*, 178 Ga. 400 (1934); *Screws v. City of Atlanta*, 189 Ga. 839 (1940); *City Council of Dawson v. Dawson Waterworks Co.*, 107 Ga. 696 (1899).

Express authority to a county to do a particular thing will imply authority to employ such means as may be necessary to accomplish the act, *Oliver v. Hall County Memorial Hospital*, 62 Ga. App. 95, but counties can exercise no powers except those which are conferred upon them by legislative action, or such as are necessary for the exercise of their corporate powers the performance of their corporate duties, and the performance of the purposes of their association."

Albany Bottling Company v. Watson, 103 Ga. 503, 505; *Wright v. Floyd County*, 1 Ga. App. 582, 585 (1907).

There is no general statutory authority in Georgia which would authorize Crisp County to enter into a contract, as was here done, under which the County assumed a liability for the taking and damaging of private property for public purposes beyond the liabil-

ty provided by the Constitution; nor can anything be found in the Constitutional provision hereinbefore quoted relating to the establishment by Crisp County of the power facility in question authorizing the county to enter into such contract. Such a contract is not only clearly against public policy as held by the district court but it establishes a debt prohibited by the Constitutional provisions hereinabove quoted, which debt admittedly was not incurred in accordance with the provisions of that section.

See: *City Council of Dawson v. Dawson Water Works Company*, 106 Ga. 696, (32 SE 907).

The Constitutional amendment authorizing Crisp County to establish the power facility provided for the establishment of a bonded debt the proceeds from which were to be used for acquiring water power sites and locations and since the county had the power of eminent domain, there could have been no reasonable necessity for a contract placing the County under a perpetual obligation to repair the respondent railroad's embankment such as were involved.

The express provisions of the constitutional amendment relating to the power of Crisp County to enter into contracts refers to the sale and disposition of power and, under the foregoing circumstances, the right to enter into the contract here involved can not be said to have been reasonably implied in the power of Crisp County to use the proceeds of the bonded indebtedness there authorized in acquiring property for

the dam and backwater. The Circuit Court does not suggest that the judgment which might be obtained in this case is to be paid out of the proceeds of the bonded indebtedness and the difficulty can not be surmounted by the direction, as stated in the Circuit Court's opinion, that such judgment should be satisfied solely out of revenues from the operation of the power plant.

The principle as stated in the decision of the Circuit Court that:

> "Where a governmental entity is authorized to exercise non-governmental powers and engages in an activity of a business nature such as is generally engaged in by individuals or private corporations, it acts as a corporation and not in any sovereign capacity. In such instance the law leans to the theory that the governmental entity has the full power to function in such capacity as a private person might do."

is not applicable to counties of the State of Georgia.

Arnold v. Walton, 205 Ga. 606, 54 S.E. 2d 424.

The contract being invalid, it follows (1) that even if Section 10 of the Federal Power Act imposed upon the county liability for the damages sued for, such liability would have to be asserted solely under the Federal Power Act and not under the contract; (2) that since Section 10 of the Federal Power Act does not in fact make the county liable for damages which it would not otherwise be liable for under the laws of the state, the action can not be upheld under the Federal Power Act, nor can it be upheld under the contract on the

theory that it was simply a recognition of a liability imposed by the Federal Power Act.

For the foregoing reasons, the decision of the Circuit Court of Appeals is erroneous and should be reversed.

While the petition contained no express allegations showing the basis for federal jurisdiction in the lower court, it might be properly construed as being based upon diversity of citizenship and as an action to enforce a liability under a federal statute.

The decision of the Circuit Court involves matters of public importance in that such decision constitutes an erroneous interpretation of an important federal statute, namely, the Federal Power Act, which, in view of increased development of public power by both private and governmental agencies, is of widespread significance; the decision is contrary in principle to decisions of this court and other Circuit Courts of Appeal, and it impinges upon state laws regulating property rights and damages with reference to public improvements by instrumentalities of the state having the power of eminent domain.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a Writ of Certiorari and thereafter reviewing and reversing said decision.

H. H. PERRY, JR.,
Albany, Georgia.
GRAYDON REDDICK and GEORGE WRIGHT, Wright & Reddick,
Cordele, Georgia, on the Petition
Counsel for Petitioner.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18171

SEABOARD AIR LINE RAILROAD COMPANY,
Appellant,

versus

COUNTY OF CRISP OF THE STATE OF GEORGIA, ET AL.,
Appellees.

Appeal from the United States District Court for the Middle District of Georgia.

(July 12, 1960.)

Before TUTTLE, CAMERON and JONES, Circuit Judges.

JONES, Circuit Judge: Crisp County, Georgia, herein called the County, was empowered by an amendment to the Constitution of Georgia[1] to build a dam across the Flint River, and to erect and operate a hydro-electric generating plant at a site upon the river specified in

[1] Georgia Laws 1925, p. 72 et seq.

the constitutional provision. A crisp County Power Commission was created, a bond issue was authorized, and the Commission was empowered by the constitutional provisions to acquire rights of way for transmission lines, and for the purpose of building, maintaining and operating dams, ponds, plants and machinery. The Power Commission was "authorized and empowered to employ such agents, servants, and employees, and to make and enter into such contracts as are reasonable and proper in the exercise of the duties and powers herein conferred upon said Commission."

The Flint River, at the site where the dam and generating plant were built, is a navigable stream. The County was required under the Federal Power Act to procure a license. See 16 U.S.C.A. §§ 191a et seq. The statute, among other things, provides:

> "Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor." 16 U.S.C.A. § 803(c).

The dam and hydro-electric plant was built during or before 1930. Since the completion of the dam and power plant, the County has been generating and marketing electric power.

The appellant, Seaboard Air Line Railroad Company, and its predecessors, operated a line of railroad in

interstate commerce between Savannah, Georgia, and Montgomery, Alabama. This line of rail had been in operation for many years before the County's dam was built. The Seaboard's tracks crossed the Flint River about eight miles upstream from the site of the dam, by a fill or embankment and a trestle or bridge. The building of the dam and the consequent raising of the water level damaged the embankment of the Seaboard over which its tracks were laid. In 1939 a written agreement was made between the Receivers of the Seaboard's then predecessor and the County. In the preamble to this contract it was recited that "the pool of water impounded by the said dam extends to and beyond the said line of railroad crossing Flint River and has submerged a portion of the embankment constituting part of said railroad line, and the submergence of the said railroad embankment by the aforesaid pool of water has occasioned injury to the said embankment; and the parties hereto have agreed on the terms and conditions pursuant to which said injury shall be repaired and future injury protected against." Included in the agreement, and stating the terms and conditions for protecting the Seaboard's embankment from further injury, was Section 3, which provided

> "Should the normal high water level of the said pool of water be raised by the County or should any change in existing conditions require, whether due to increase in the height or other structural changes in the dam, failure of the rip-rap to be installed hereunder properly to protect the said embankment from injury, or otherwise, County will at its expense take

such action as may be necessary to protect said railroad embankment from injury."

By its terms the agreement inured to the benefit of the successors of the then railroad company and its Receivers.

On January 29, 1957, the Seaboard gave notice to the County that the embankment was in a bad state of repair and had been seriously damaged by being undermined by water impounded by the dam. Seaboard made demand upon the County to protect the embankment. The County refused to repair the embankment. On June 28, 1958, the Seaboard brought suit against the County alleging that the Seaboard had made repairs to the embankment at a cost of $54,286.18 for which it prayed judgment. The Seaboard asserted that the County was liable both under the agreement and by reason of the provisions of the Federal Statute under which the Federal Power Commission granted a license to the County. In its answer the County denied some of the Seaboard's factual averments but admitted that it had refused to make repairs on the embankment. The County asserted that the Seaboard's complaint failed to state a claim upon which relief could be granted; and specifically alleged that the contract was ultra vires and unenforceable so far as the County is concerned, that the Federal Statute imposed no liability on the County and if it undertook to do so it would be unconstitutional and void, and that the cause of action of the Seaboard, if any it had, was in eminent domain for damage resulting from a taking when the dam was

built, but that any such claim had long since been barred by limitations.

The district court held with the County. It was of the opinion that the Federal Power Act imposed no liability on the County for injuries inflicted upon the property of others by the County's operations. The court held that, under the Georgia Constitution and the decisions construing it, there was no authorization for the County to enter into the contract with the Seaboard, and that the County was prohibited from assuming the obligations which it had undertaken by its contract to discharge. The complaint was dismssed, judgment was entered for the County, and the Seaboard has appealed. We think the district court has misconceived the meaning and purpose of the provision of the Federal Power Act which provided for liability of licensees for damage to property of others, although its conclusion that the liability imposed relates only to legal liabilities already existing has support in two state court decisions. *Rice Hope Plantation v. South Carolina Public Service Authority*, 216 S. C. 500, 59 S. E. 2d 132; *Alabama Power Co. v. Smith*, 229 Ala. 105, 155 So. 601. If the County had not obtained a license from the Federal Power Commission it would have had no right to build the dam and construct the generating plant. *Federal Power Commission v. Oregon*, 349 U. S. 435, 75 S. Ct. 832, 99 L. Ed. 1215; *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U. S. 152, 66 S. Ct. 906, 90 L. Ed. 1143, reh. den. 328 U. S. 897, 66 S. Ct. 1337, 90 L. Ed. 1647; *Georgia Power Co. v. Federal Power Commission*, 5th Cir. 1946, 152 F. 2d 908. The license is conditioned upon the ac-

ceptance of the terms of the Act. 16 U.S.C.A. § 799. It seems to us unlikely that the Congress intended by the language it used to do no more than to disclaim liability on the part of the United States for the acts of the licensee. When the Federal Power Act was passed in 1920, sovereign immunity from suit would have proctected the United States from any liability. Cf. *Philadelphia Co. v. Stimson*, 223 U.S. 605, 32 S. Ct. 340, 56 L. Ed. 570. The waiver of the Federal Tort Claims Act did not become effective until many years later. The control of the United States over navigable streams empowers Congress to condition the licenses in any manner it deems proper. No impropriety can be inferred from a requirement that a licensee protect the property of others. That this requirement was imposed by the Act as a condition of a license has been recognized by the Supreme Court. *Henry Ford & Son, Inc. v. Little Falls Fiber Co.*, 280 U. S. 369, 50 S. Ct. 140, 74 L. Ed. 483. See also *Grand River Dam Authority v. Federal Power Commission*, 10th Cir. 1957, 246 F. 2d 453; *United States v. Central Stockholders Corp.*, 9th Cir. 1931, 52 F. 2d 322; *Levin v. Philadelphia Electric Power Co.*, D. C. E.D.Pa. 1929, 34 F. 2d 224. In the year 1939, the same year that the County made its contract with the Seaboard to protect the embankment from injury, the Supreme Court of Washington held that, under the provision of the Federal Power Act, a licensee which erected a dam was liable to a railroad for damages to an embankment. *Great Northern Railway Co. v. Washington Electric Co.*, 107 Wash. 627, 86 Pac. 2d 208. We are unable to reach any different conclusion.

The district court decided that the provision of the Federal Power Act, 16 U.S.C.A. § 803(c), imposing liability upon licensees for damage to the property of others means merely that if legal liability exists it shall be the liability of the licensee and not that of the Federal Government. The district court concluded that, under the precedent of *Bibb County v. Green*, 42 Ga. App. 552, 156 S.E. 745, the Seaboard was barred from recovery by limitations upon the expiration of twelve months from the completion of the dam. In the Bibb County case it was said that the right to compensation for injury to private property inflicted by a county exists, under the Georgia Constitution, only where the enjoyment of a right of the property owner is interfered with and the property is thereby rendered less valuable. The doctrine of sovereign immunity was construed as prohibiting suits against counties for continuing or recurring injuries resulting from the constructing of a public improvement.

It is not asserted that the right of the Seaboard to own and use the embankment for the carrying of its rail over which its trains operate was not a right which was recognized by the laws of Georgia. It is, though, contended, and the district court so held, that the right is one which could be protected, if at all, by eminent domain. It is not apparent whether the extent of the future damage could have been estimated at the time the dam was built. Indeed, it may be doubted that it was contemplated by either the Seaboard or the County that the raising of the water level by the dam would

cause damage to the dam. Eight years or more elapsed after the dam was completed before the contract was made for the repair of the embankment. In that agreement it was recognized that the damage might recur. Also in the agreement was the recognition of the liability of the County for the protection of the embankment from future injury. It seems doubtful, under the circumstances existing when the dam was built and for two years thereafter, that the power of eminent domain could have been invoked by the County for the acquisition of the right to undermine the Seaboard's embankment in the future and at recurring intervals. Cf. *Henry Ford & Son v. Little Falls Fibre Co., supra.*

The County did not attempt to acquire by eminent domain the right to inflict damage upon the embankment and to continue inflicting damage from time to time. Neither did the Seaboard seek any remedy having its origin in a taking of or damage to property such as might have been made the basis for a condemnation award. But whether or not the right of eminent domain might have been invoked, it does not follow that the County can, for that reason, evade the liability that the statute imposes for the damage to the Railroad's embankment. If it had been intended that this liability could be asserted only by a proceeding in eminent domain the statutory provisions would have been cast in different form. It is apparent, we think, that in providing for liability of a licensee for all damages occasioned by the maintenance or operation of the project works, as well as by construction, Congress contemplated damage inflicted after as well as at the time

of the construction. The Seaboard's right was not restricted to an award in eminent domain.

Where a governmental entity is authorized to exercise non-governmental powers and engages in an activity of a business nature such as is generally engaged in by individuals or private corporations, it acts as a corporation and not in any sovereign capacity. In such instances the law leans to the theory that the governmental entity has the full power to function in such capacity as a private person might do. 37 Am. Jur. 748, Municipal Corporations § 132; *Miami Beach Airline Service v. Crandon*, 159 Fla. 504, 32 So. 2d 153, 172 A.L.R. 1425.

As was stressed in the opinion of the district court, it is the general rule in Georgia that counties can exercise no powers except those granted to them by the State, and can be held liable upon their contracts only when the State has authorized the incurring of the liability which is asserted against them. Crisp County, like other Georgia Counties, is a body corporate under the Georgia law. Ga. Code § 23-1501. It is expressly authorized by a constitutional grant of power to build and maintain a dam and to construct and operate a hydro-electric generating plant. It has built the dam and has constructed the plant. It is now maintaining and operating them. Incident to these specific non-governmental powers, the constitutional amendment gave, in broad and comprehensive terms, the power to contract. The general limitations upon the contractual powers of counties as contained in the general provisions of the

State Constitution must yield to the specific Crisp County amendment to such extent as may be required in order to give full effect to the grant of power to make and enter into such contracts as are reasonable and proper in exercise of the duties and powers conferred upon the County. See *Stewart v. Bacon County*, 148 Ga. 105, 95 S.E. 983.

The statute imposed a liability upon the County for damage to the Seaboard's embankment. In recognition of that liability the County made the 1939 agreement for the repairing then of the embankment, which was done, and for the future protection of the embankment, which it refuses to do. The operation of the hydro-electric plant is a business operation. It is separate from the normal governmental functions of the County. The power of the County to make contracts, implied by law as well as conferred by the constitutional amendment, is full authorization for the contract made in the assumption of the duty as imposed by the federal statute. See *Crisp County v. S. J. Groves & Sons Co.*, 5th Cir. 1934, 73 F. 2d 327, 96 A.L.R. 391. The order of the district court must be reversed and the cause remanded for further proceedings.

In the event a judgment is ultimately rendered for the Seaboard, it seems that it should not be discharged out of the general tax revenues of the County. *Polk County v. Lincoln National Life Insurance Co.*, 5th Cir. 1959, 262 F. 2d 486. However, the revenues of the hydro-electric plant can be made available for such purpose. Cf. *Crisp County v. S. J. Groves & Sons Co.*, *supra*.

Our holding here does not in any way conflict with the decision in *Seaboard Air Line Railroad Co. v. Sarasota-Fruitville Drainage District*, 5th Cir. 1958, 251 F. 2d 583, reversed on rehearing, 255 F. 2d 622, cert. den. 358 U. S. 836, 79 S. Ct. 60, 3 L. Ed. 2d 73; *Seaboard Air Line Railroad Co. v. Sarasota-Fruitville Drainage District*, 5th Cir. 1958, 255 F. 2d 626. In that case the statute creating the drainage district prohibited the district from expending its tax revenues except for improvement and maintenance of the drainage district. Since the district had no other source of funds, it could not be compelled to respond in damages for tort, nor could it make a valid agreement to indemnify against tort liability. Here the County was under a duty imposed by the Federal Power Act to protect the Seaboard's property, and thus the Act created a tort liability.

The order of the district court is reversed and the cause is remanded.

REVERSED AND REMANDED.

A true copy.

Test:

EDWARD W. WADSWORTH,
Clerk, U. S. Court of Appeals,
Fifth Circuit.
By CLARA R. JAMES,
Deputy.

New Orleans, Louisiana, Nov. 25, 1960

JUDGMENT.

Extract from the Minutes of July 12, 1960.

No. 18171.

SEABOARD AIR LINE RAILROAD COMPANY,

versus

COUNTY OF CRISP OF THE STATE OF GEORGIA, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings.

It is further ordered and adjudged that the appellees, County of Crisp of the State of Georgia, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 18171.

SEABOARD AIR LINE RAILROAD COMPANY,
Appellant,

versus

COUNTY OF CRISP OF THE STATE OF GEORGIA, ET AL.

Appeal from the United States District Court for the Middle District of Georgia.

(September 1, 1960.)

Before TUTTLE, CAMERON and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED That the petition for rehearing in the above entitled and numbered cause be, and it is hereby, DENIED.

FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 28 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 557

COUNTY OF CRISP OF THE STATE OF GEORGIA, ET AL.,

Petitioners,

versus

SEABOARD AIR LINE RAILROAD COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF SEABOARD AIR LINE RAILROAD COMPANY, RESPONDENT.

J. C. McDONALD,

P. O. Address:
P. O. Box 408,
Fitzgerald, Georgia.

CHARLES T. ABELES,
Attorneys for Respondent.

P. O. Address:
3600 West Broad Street,
Richmond, Virginia.

INDEX.

	Page
STATEMENT OF THE CASE	1
(1) Jurisdictional Matters	2
(2) Questions Presented for Review	3
ARGUMENT:	
(1) Validity of Contract	3
(2) Liability of County Under Federal Power Act	10
(3) Liability Under Georgia Constitution and Laws	14
CONCLUSION	15

CASES CITED.

Atlanta Terra Cotta Co. v. Ga. Ry. & Elec. Co., 132 Ga. 537, (64 S. E. 563)	8
Barfield v. Macon County, 49 Ga. App. 239, (175 S. E. 29)	14
Bates v. Madison County, 32 Ga. App. 370, (123 S. E. 158)	14
Central Georgia Power Company v. Butts County, 139 Ga. 490, (77 S. E. 380)	6
Central Georgia Power Co. v. Mays, 137 Ga. 120, (72 S. E. 900)	8
Decatur County v. Praytor, Howton & Wood Contracting Company, 163 Ga. 929 (137 S. E. 247)	8
Elberton Southern Railway Company v. State Highway Department of Georgia, 211 Ga. 838, (89 S. E. 2d 645)	5

CASES CITED—(Continued)

	Page
Federal Power Commission v. Oregon, 349 U. S. 435, 75 S. Ct. 832, 99 L. Ed. 1215	13
Felton Farm Co. v. Macon County, 49 Ga. App. 239, (175 S. E. 29)	14
First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U. S. 152, 66 S. Ct. 906; 90 L. Ed. 1145	13
Georgia Power Co. v. Federal Power Commission, 5th Cir. 1946, 152 F. 2d 903	13
Grand River Dam Authority v. Federal Power Commission, 10th Cir. 1957, 246 F. 2d 453	12
Great Northern Railway Co. v. Washington Electric Co., 107 Wash. 627 (86 P. 2d 208)	12
Gwinnett County v. Allen, 56 Ga. App. 753, (194 S. E. 38)	14
Henry Ford & Son, Inc. v. Little Falls Fiber Co., 280 U. S. 369, 50 S. Ct. 140, 74 L. Ed. 483	12
Layne & Bowler Corp. v. Western Well Workers, Inc., 261 U. S. 387, 67 L. Ed. 712, 43 S. Ct. 422	2
Levin v. Philadelphia Electric Power Co., D. C. E.D Pa. 1929, 34 F. 2d 224	12
Lynch, et al. v. Harris County, et al., 188 Ga. 651, (4 S. E. 2d 573)	8
McArthur, et al. v. State Highway Department, 85 Ga. App. 500, (69 S. E. 2d 781)	8
McCrea v. Georgia Power Co., 46 Ga. App. 276 (167 S. E. 540)	8
Miami Beach Airline Service v. Crandon, 159 Fla 504, (32 So. 2d 153)	9
Oliver v. Hall County Memorial Hospital, 62 Ga. App 95 (8 S. E. 2d 138)	9
Rice v. Sioux City Memorial Park Cemetery, U. S Iowa 1955, 75 S. Ct. 614, 349 U. S. 70, 99 L. Ed 897	2

CASES CITED—(Continued)

	Page
Smith v. Floyd County, 85 Ga. 420 (11 S. E. 850)	8, 14
Testa v. Katt, 330 U. S. 386, 67 S. Ct. 810, 91 L. Ed. 967	13
United States v. Central Stockholders Corp., 9th Cir. 1931, 52 F. 2d 322	12
Washington County v. Sheppard, 46 Ga. App. 240 (167 S. E. 339)	7
Williams v. State Highway Board of Georgia, 195 Ga. 18, (22 S. E. 2d 821)	8
Wright v. Floyd County, 1 Ga. App. 582, (58 S. E. 72)	7

STATUTORY CITATIONS

Section 10 of the Federal Power Act [16 U.S.C.A. Sec. 803 (c)]	3, 10, 11
Georgia Laws 1925 (pp. 272 et seq.)	4
Georgia Laws 1894 (p. 95)	6
Georgia Code Annotated, Sec. 36-301	6
Georgia Code Annotated, Sec. 36-302	6
Georgia Code Annotated, Sec. 2-301	14
United States Code Annotated, Constitution, Art. 6, Sec. 2	13

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. .....

COUNTY OF CRISP OF THE STATE OF GEORGIA, ET AL.,

Petitioners,

versus

SEABOARD AIR LINE RAILROAD COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF SEABOARD AIR LINE RAILROAD COMPANY, RESPONDENT.

I.

The petitioners in their brief have succinctly stated the questions to be decided in this case and have correctly set out the opinion of the Fifth Circuit Court of Appeals, and the applicable law as well as statement of the case, and we shall address our reply to the

propositions which are argued in the brief of petitioners.

At the outset we think that the decision of the Fifth Circuit Court of Appeals stated clearly the law involved in this case and that said decision is eminently correct.

II.

While we recognize that the granting of a writ of certiorari is a matter of sound judicial discretion, we submit that the present petition does not come within the purview of Rule 19 of the Supreme Court Rules, and this court has held that certiorari should not be granted except in cases involving principles, the settlement of which is of importance to the public, as distinguished from that of parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. *Rice v. Sioux City Memorial Park Cemetery*, U. S. Iowa 1955, 75 S. Ct. 614, 349 U. S. 70, 99 L. Ed. 897. *Layne & Bowler Corp. v. Western Well Works Inc.*, 261 U. S. 387, 393, 67 L. Ed. 712, 714, 43 S. Ct. 422.

Petitioners on page 21 of their brief state:

> "The decision of the circuit court involves matters of public importance in that such decision constitutes an erroneous interpretation of an important federal statute, namely, the Federal Power Act, which, in view of increased development of public power by both private and governmental agencies, is of widespread significance; the deci-

sion is contrary in principle to decisions of this court and other circuit courts of appeal, and it impinges upon state laws re-regulating property rights and damages with reference to public improvements by instrumentalities of the state having the power of eminent domain."

However, from reading the petition and the brief in support thereof, we submit this statement is not substantiated, as is apparent from reading the citations set out in the brief, and the opinion of the Fifth Circuit Court of Appeals.

III.

There are really three questions involved in this case.

1. The validity of the contract between Crisp County, Georgia, acting through its power commission, and the Seaboard Air Line Railroad Company.

2. What liability exists under Section 10 of the Federal Power Act, as contained in 16 U.S.C.A., Section 803 (c).

3. Liability under the Georgia constitution and laws.

IV.

THE CONTRACT IN THIS CASE IS VALID.

By amendment to the constitution of the State of Georgia, Crisp County, through its power commission,

was given among other powers the right to make and enter into such contracts as are reasonable and proper in the exercise of the duties and powers conferred upon said commission. See Georgia law 1925, pp. 272, et seq. Thus, it will be seen that Crisp County stands on a different footing from other counties in Georgia, in that it is the only county in Georgia which has the right to operate a hydro-electric power plant, and this authority was given to it under an amendment to the constitution of the State of Georgia. If it had not been for the constitutional amendment, Crisp County would not be in the power business, but having been given authority to engage in the generation of hydro-electric power, and having been given authority to make all contracts necessary to carry out such powers, it is reasonable to say that the county through its power commission was given authority to make the contract in question.

The railroad company had been crossing the Flint River for many years prior to the time the dam was built therein by Crisp County and its commission, and in order to lawfully engage in the manufacture, sale and distribution of hydro-electric energy, two things had to be done by Crisp County. First, a constitutional amendment to the constitution of Georgia had to be obtained, permitting the dam and power plant to be built and second, a license had to be procured from the Federal Power Commission to erect and maintain a dam in the Flint River, the same being a navigable stream.

After the dam was built, it became apparent to all the parties that the high water caused by the dam in said river was going to have an adverse effect upon the trestle and embankment of the railroad.

It was well known that the railroad, which is a quasi public corporation, would be forced to operate its railroad across the Flint River, and it could not cease doing so even if it so desired, unless authority was given by the Interstate Commerce Commission for the Seaboard to abandon the operation of said railroad across the said river.

Certainly, no one would contend that merely because Crisp County was getting the authority to build a dam that it would have the right to destroy the trestle and embankment of the railroad.

The Supreme Court of Georgia recognizes this fact and held that where the condemnor is the one exercising a delegated power of eminent domain, the rule of strict construction is applied in determining whether there has been conferred upon the condemnor the express or implied authority to divert property already devoted to public use to a new and different public use. *Elberton Southern Railway Company v. State Highway Department of Georgia*, 211 Ga. 838, (89 S.E. 2d, 645). See also: 29 C.J.S., Sec. 30, pp. 872.

The parties to this action recognized the mutual rights of each other and attempted to settle the same

by contract rather than by litigation. The Georgia Code recognizing that this should be done, provides:

> "All corporations or persons authorized to take or damage private property for public purposes shall proceed as herein set forth. (Acts 1894, p. 95)", Section 36-301, Georgia Code Annotated.

Then the code states:

> "If said corporations or persons cannot by contract procure the land, easement, right of way, waterway, franchise, or other interest or property useful, needful, and necessary for public purposes, and authorized by law to be taken or damaged, said corporation or person may take or damage said property, upon paying or tendering to the owner thereof just and adequate compensation for the land, franchise, or other interest or property to be taken or used. (Acts 1894, p. 95)". Section 36-302, Georgia Code Annotated.

Thus, it will be seen that the Georgia law provides that these matters should be settled by agreement if possible.

The Court of Appeals of Georgia which ordinarily is a court of equal authority with the Supreme Court of Georgia in its particular sphere, has held that express authority to a county board to do a particular thing will imply authority to employ such means and agencies as may be necessary to accomplish the act *Oliver v. Hall County Memorial Hospital*, 62 Ga. App. 95 (1940), 8 S.E. 2d. 138.

One of the leading Georgia cases on the question of a county's powers is that of *Wright v. Floyd County*, 1 Ga. App. 582 (58 S.E. 72). This decision is very exhaustive and discusses rather fully the rights of counties in Georgia to make contracts. Another case dealing with the authority of the counties in Georgia to enter into a contract is that of *Washington County v. Sheppard*, 46 Ga. App. 240 (1933), (167 S.E. 339).

The Supreme Court of Georgia has held:

> "A written contract duly entered on the minutes of the county board, between the commissioners of roads and revenues of a county and a power company intending to use water to be contained in a large reservoir as its source of power, that if the county will suffer the flooding of a certain road, the power company will make the necessary changes of location and erect the necessary bridges, all at its own expense, before the reservoir is filled, is an enforceable contract; and if for any cause specific performance of it is impossible, damages for its breach may be recovered.
>
> "(a) The written application by the power company, its acceptance by the proper county authorities, and the entry of both on the minutes, are sufficient to constitute a contract." Central Georgia Power Company v. Butts County, 139 Ga. 490, (77 S.E. 380).

The law in Georgia is that a county is liable for the breach of a valid authorized contract, notwithstanding the fact no statute expressly authorizes the

same. *Decatur County v. Praytor, Howton & Wood Contracting Company*, 163 Ga. 929; (137 S.E.247). See also: *Lynch et al. v. Harris County, et al.*, 188 Ga. 651, (4 S.E. 2d 573).

The Supreme Court of Georgia, in an early case, held that where a county has damaged private property by constructing an embankment and trestle as an approach to a public bridge the county would be liable to the owner for such damages although there was no statute authorizing such action based on the ground that the constitution declares that private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid. *Smith v. Floyd County*, 85 Ga. 420, (11 S.E. 850).

The Court of Appeals of Georgia in the case of *McArthur, et al. v. State Highway Department*, 85 Ga. App. 500, (69 S.E. 2d 781) expressly held that consequential damages to property caused by the negligent or improper construction of the improvement are not proper consideration in a condemnation proceeding but are the subject for a separate suit for damages, citing the following cases: *Atlanta Terra Cotta Co. v. Ga. Ry. & Elec. Co.*; 132 Ga. 537 (5) (64 S.E. 563); *Central Georgia Power Co. v. Mays*, 137 Ga. 129 (4) (72 S.E. 900); *McCrea v. Ga. Power Co.*, 46 Ga. App. 276 (3) (167 S.E. 540); 29 C.J.S. 1029, Sec. 161.

This is followed up in the case of *Williams v. State Highway Board of Georgia*, 195 Ga. 18 (22 S.E. 2d

821), which held where a petition sought consequential damages against a county resulting from the manner in which a highway was constructed stated a cause of action and certainly, this would answer any contention that suit could not be brought for damages against the County of Crisp.

It is to be remembered that Crisp County was given the right to operate a hydro-electric generating plant and was given full authority to make all contracts necessary to carry on this business. The Fifth Circuit Court of Appeals has very succinctly stated the real trend of modern law, quoting from the opinion as follows:

> "Where a governmental entity is authorized to exercise non-governmental powers and engages in an activity of a business nature such as is generally engaged in by individuals or private corporations, it acts as a corporation and not in any sovereign capacity. In such instances the law leans to the theory that the governmental entity has the full power to function in such capacity as a private person might do. 37 Am. Jur. 748, Municipal Corporations Sec. 132; Miami Beach Airline Service v. Crandon, 159 Fla. 504, 32 So. 2d 153, 172 A.L.R. 1425."

The questions in this case could not have been determined by eminent domain. According to the contentions of the petitioners herein, the County of Crisp, acting through the power commission, should have acquired the right to destroy the Seaboard trestle and embankment by eminent domain. It is very doubtful

that any court would have permitted this to have been done. It is doubtful if the Seaboard suffered any damage at the time the dam was originally built. Can it be truthfully said that, because the Seaboard would not have suffered any damages at the time the dam was built, it would be forever barred from asserting any claim for damages which may have occurred at a subsequent date? The parties in this case simply did what ordinary people would do, and that is to attempt to settle their differences by contract. The parties dealt at arm's length and both fully understood their respective obligations, and we respectfully submit that the contract in question is not ultra vires, but it was a binding, enforceable agreement and that the Fifth Circuit Court of Appeals was correct in so finding.

V.

THE SEABOARD HAD RIGHTS UNDER SECTION 10 OF THE FEDERAL POWER ACT, AS FOUND IN 16 U.S.C.A. SECTION 803 (e).

This succinctly states:

> . . . "Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license" . . .

It is our contention that the law of Georgia protected the Seaboard in its right-of-way, trestle and embank-

ment across the Flint River and that when this was damaged, owing to the construction, maintenance and operation of the dam built by Crisp County in the Flint River, that it became liable for all damages to the Seaboard.

All the decisions cited by petitioners in their brief hold that under the Section 10 of the Federal Power Act the licensee is liable for any damages due to the construction, maintenance and operation of the project works.

The Fifth Circuit Court of Appeals did not predicate its decision solely on the liability under Section 10 of the Federal Power Act. The court in its opinion stated as follows:

> "It is not asserted that the right of the Seaboard to own and use the embankment for the carrying of its rail over which its trains operate was not a right which was recognized by the laws of Georgia. It is, though, contended, and the district court so held, that the right is one which could be protected, if at all, by eminent domain. It is not apparent whether the extent of the future damage could have been estimated at the time the dam was built. Indeed, it may be doubted that it was contemplated by either the Seaboard or the County that the raising of the water level by the dam would cause damage to the dam. Eight years or more elapsed after the dam was completed before the contract was made for the repair of the embankment. In that agreement it was recognized that the damage might recur.

> Also in the agreement was the recognition of the liability of the county for the protection of the embankment from future injury. It seems doubtful, under the circumstances existing when the dam was built and for two years thereafter, that the power of eminent domain could have been invoked by the county for the acquisition of the right to undermine the Seaboard's embankment in the future and at recurring intervals. Henry Ford & Sons, Inc. v. Little Falls Fiber Co., 280 U. S 369, 50 S. Ct. 140, 74 L. Ed. 483."

This Court, and other courts have recognized rights exist under Section 10 of the Federal Power Act *Henry Ford & Son, Inc. v. Little Falls Fiber Co., supra; Grand River Dam Authority v. Federal Power Commission*, 10th Cir. 1957, 246 F. 2d 453; *United States v. Central Stockholders Corp.*; 9th Cir. 1931, 52 F. 2d 322; *Levin v. Philadelphia Electric Power Co.*, D. C ED.Pa. 1929, 34 F. 2d 224.

Particular attention is called to the fact that in the year 1939, the same year Crisp County made its contract with the Seaboard, that the Supreme Court of Washington held that, under the provisions of the Federal Power Act, a licensee which erected a dam was liable to a railroad for damages to an embankment. *Great Northern Railroad Co. v. Washington Electric Co.*, 107 Wash. 627, 86 Pac. 2d 208.

It was pointed out by the Circuit Court of Appeals if the county had not obtained a license from the Federal Power Commission it would not have had the

right to build the dam and construct the generating plant. The court cited as authority for this statement the following cases: *Federal Power Commission v. Oregon*, 349 U. S. 435, 75 S. Ct. 832, 99 L. Ed. 1215; *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U. S. 152, 66 S. Ct. 906, 90 L. Ed. 1143, reh. den. 328 U. S. 897, 66 S. Ct. 1337, 90 L. Ed. 1647; *Georgia Power Co. v. Federal Power Commission*, 5th Cir. 1946, 152 F. 2d 908.

The Seaboard in its complaint alleges that its trestle and embankment had been undermined by the ebbing and flowing of the waters of the Flint River against its trestle and embankment, and damaged to the extent of some $50,000.00; that the defendant recognized their liability by entering into a contract agreeing to remedy and pay for such damage. The plaintiff railroad acting and relying upon this contract, repaired the damage to its trestle and embankment and called upon the defendants for reimbursement and payment in accordance with the terms of the contract. The defendants' liability became fixed under the contract and also under Section 10 of the Federal Power Act.

The United States Constitution and the laws passed pursuant to it are the supreme laws of the land binding alike upon states, courts and the people, anything in the constitution or laws of any state to the contrary notwithstanding. U.S.C.A. Constitution, Art. 6, Sec. 2 *Testa v. Katt*, 67 S. Ct. 810, 330 U. S. 386, 91 L. Ed. 967, 172 A.L.R. 225.

VI.

THE DEFENDANTS ARE ALSO LIABLE UNDER THE CONSTITUTION OF THE STATE OF GEORGIA, WHICH PROVIDES THAT PRIVATE PROPERTY SHOULD NOT BE TAKEN OR DAMAGED FOR PUBLIC PURPOSES WITHOUT JUST AND ADEQUATE COMPENSATION BEING FIRST PAID. GEORGIA CONSTITUTION, PAR. 1, SECTION 3, ARTICLE 1, GEORGIA CODE ANNOTATED, SECTION 2-301.

There are numerous decisions in Georgia which hold that a county is liable for damages resulting from the taking or damaging of private property for public purposes. See *Smith v. Floyd County*, 85 Ga. 420, (11 S. E. 850) (1890); *Bates v. Madison County*, 32 Ga. App. 370, (123 S. E. 158) (1924); *Gwinnett County v. Allen*, 56 Ga. App. 753, 755, (194 S. E. 38) (1937); *Barfield v. Macon County*, 109 Ga. 386, (34 S. E. 596) (1898), and finally it was held in *Felton Farm Co. v. Macon County*, 49 Ga. App. 239, (175 S. E. 29) (1934), that a county can be held liable to the extent of an injury sustained by property through public works, not on the theory that the county is liable, as are other tort-feasors, for the negligent acts and conduct of its agents while acting within the scope of their authority, but for the reason that it cannot, either with or without the guise of contractual authority, damage the property of another for the public use without just and adequate compensation being paid.

CONCLUSION.

We therefore respectfully submit that this case was correctly decided by the Fifth Circuit Court of Appeals and that the writ of certiorari should be denied.

J. C. McDONALD,

P. O. Address
P. O. Box 408,
Fitzgerald, Ga.,

CHARLES T. ABELES,
Attorneys for Respondent.

P. O. Address
3600 West Broad Street,
Richmond, Virginia.

I, CHARLES T. ABELES, do hereby certify that I have this day served the petitioners in the within case with copies of the foregoing brief of respondent, by mailing a copy of the same to Honorable H. H. Perry, Jr., P. O. Box 747, Albany, Georgia, and a copy to Honorable Graydon Reddick and Honorable George Wright, Cordele, Georgia, they being attorneys of record for petitioners.

All of this on the ..... day of December, 1960.

CHARLES T. ABELES